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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 3811/2019**

INDEPENDENT THOUGHT

..... Petitioner

Through: Mr. Vikram Srivastava and Ms. Shalu,
Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Ms. Monika Arora, CGSC with Mr. Yash
Tyagi and Mr. Subhrodeep, Advocates for
UOI.

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Date of Decision: 03rd May, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

MANMOHAN, J: (ORAL)

1. Present writ petition has been filed with the following prayers:-

“a) issue an appropriate writ, order or direction in the nature of certiorari or such other similar writ, in the nature of declaration, declaring Section 198(6) to the extent inconsistent with the provisions of Protection of Children from Sexual Offences Act, 2012 as unconstitutional & ultra-vires and liable to be struck down; and

b) issue an appropriate writ, order or direction in the nature of certiorari or a writ of declaration that the provisions of Section 19 read with Section 21 of the Protection of Children from Sexual Offences Act, 2012 requiring mandatory reporting of offence being committed under the Act overrides the restrictions being imposed under Section 198(1) read with 198(3); and

c) issue an appropriate writ, order or direction in the nature of certiorari or a writ of declaration broadening the definition of 'person' under 198(3) who

intends to complaint on behalf of a person under the age of eighteen years, specifically to include Childline (1098), Child Welfare Committee and other agencies as provided under the Juvenile Justice (Care and Protection of Children) Act, 2015, so to empower them with responsibility.

d) issue an appropriate writ, order or direction in the nature of certiorari or a writ of declaration for harmonious and purposive amendment of provisions of 198(6) Code of Criminal, 1973 allowing minor victims of marital rape to have benefits of file compliant till the age of 20 years in consonance with the provisions of Section 3(3) of the Prohibition of Child Marriage Act, 2006.

e) Pass such other order or orders and directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case as also in the interest of justice;”

ARGUMENTS ON BEHALF OF THE PETITIONER

2. At the outset, learned counsel for the petitioner states that the petitioner would be satisfied if a declaration is granted to the effect that Section 19 read with Section 21 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') override the restrictions imposed under Section 198(1) read with Section 198(3) of the Code of Criminal Procedure, 1973 ('Cr.P.C') and if the limitation to file the complaint by a minor victim is extended till she completes two years of attaining majority.

3. Learned counsel for the petitioner submits that Section 198(6) Cr.P.C is an impediment to the protection of rights of minor girl children who are victims of marital rape as it restricts the right of such minor victims to legal remedy. He submits that while substantive law provides for no categorisation or differentiation of any sort, the procedural law continues to discriminate against a minor girl victim of marital rape. The relevant portion of Section 198 of Cr.P.C. relied upon by learned counsel for the petitioner is reproduced hereinbelow:-

“198.Prosecution for offences against marriage. (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that-

(a) Where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

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(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

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(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.”

4. Learned counsel for the petitioner states that the growing criminal trend to marry young minor girls is reflected in the 2016 National Crime Records Bureau (NCRB) data. He emphasises that the NCRB data is a reflection of only the reported cases and the actual numbers must be much more. The 2016 NCRB data as extracted in the present writ petition is reproduced hereinbelow:-

<i>PURPOSE OF KIDNAPPING & ABDUCTION FOR MARRIAGE</i>												<i>Total Child Victims</i>		
<i>Below 6 years</i>			<i>6 to 12 years</i>			<i>12 to 16 years</i>			<i>16 to 18 years</i>					
<i>M</i>	<i>F</i>	<i>T</i>	<i>M</i>	<i>F</i>	<i>T</i>	<i>M</i>	<i>F</i>	<i>T</i>	<i>M</i>	<i>F</i>	<i>T</i>	<i>M</i>	<i>F</i>	<i>T</i>
0	139	139	0	666	666	0	6461	6461	1	9671	9672	1	16937	16938

5. He states that from the aforesaid table, it is apparent that out of total reported cases of 16,938, except one case of male child, all other cases involved abduction of girls. According to him, what is really shocking is the fact that 139 children below the age of six years had also been kidnapped for the purpose of marriage. He states that in the age group of 6-12 years, the number of girls kidnapped were 666 and the number of such kidnappings in the age group of 12-16 years was 6,461 and the number of girls kidnapped between the age group of 16-18 years was 9,671.

6. He also points out that the census data of 2011 concerning birth reveals that many girls below fifteen years of age are forced to give birth to children. He emphasises that there were 29,714 girl children below the age of fifteen years who gave birth to one child and there were 29,130 girl children aged less than fifteen years who gave birth to two children.

7. He submits that in all cases of child sexual abuse, including those concerning child victims of marital rape, the provisions of POCSO Act being a special law will override the Indian Penal Code ('IPC') by virtue of Section 42A of the POCSO Act.

8. He lastly submits that minor victims of marital rape may not be able to file complaints or inform others about the crime during the time period they are minors. He prays that minor victims of marital rape be allowed to file complaint till they attain the age of twenty years in consonance with Section 3(3) of Prohibition of Child Marriage Act, 2006 ('PCM Act'). The said Section is reproduced hereinbelow:-

“3. Child marriages to be voidable at the option of contracting party being a child. – (1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:.....

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.”

ARGUMENTS ON BEHALF OF THE RESPONDENTS

9. Learned counsel for the Union of India states that she has already placed on record the comments received by her from the Ministry of Home Affairs in relation to Cr.P.C as well as from the Ministry of Women & Child Development with regards to the POCSO Act and the Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJ Act') in the present writ petition. She prays that the said comments be read as her arguments. The comments are reproduced hereinbelow:-

“Comments for drawing up A Short Counter Affidavit to be filed by the Ministry of Home Affairs in Writ Petition No. of filed by Independent Thought before the Hon’ble High Court of Delhi.

1. The petitioner seeks order to declare section 198(6) to the extent it is inconsistent with the provisions of POCSO Act, as unconstitutional and liable to be struck down, that section 19 read with section 21 of the POCSO Act requiring mandatory reporting of offence being committed under the Act overrides the restrictions being imposed under section 198 (1) read with 198(3) of CrPC and order for harmonious and purposive amendment of provisions of 198(6) CrPC allowing minor victims of marital rape to have benefits of filing complaint till age 20 years in consonance with provisions of section 3 (3) of POCSO.

2. The Code of Criminal Procedure, 1973 (CrPC) is a legislation on general procedure for administration of criminal law in India. However, the Protection of Children from Sexual Offences Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2015 are laws governing a specific matter. The POCSO Act 2012 was formulated specifically in order to effectively address sexual abuse and sexual exploitation of children through legal provisions. The JJ Act was specially formulated for children alleged and found to be in conflict with law and children in need of special care and protection.

3. As per the doctrine of Lex specialis derogat legi generali if two laws govern the same factual situation, a law governing a specific subject matter (lex specialis) overrides a law governing only general matters (lex generalis). The doctrine of “Lex posterior derogate legi priori' may also apply, the younger law overriding the older law.

4. The intention of the petitioner for filing the Writ to protect minors from provisions of CrPC has already been taken care of. It is not necessary to amend or declare unconstitutional any of the provisions of the CrPC. The POCSO Act and the JJ Act would override the CrPC if any such situation arises.

5. The deponent craves leave to file additional affidavit if required at later stage.”

10. Learned counsel for the respondent-Union of India submits that Section 3(3) of the PCM Act has no application to minor victims of marital rape as the said provision only deals with voidability of child marriage. She also points out that Sections 472 and 473 of Cr.P.C provide for extension of period of limitation in certain cases. The said sections are reproduced hereinbelow:-

“472. Continuing offence.—In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

473. Extension of period of limitation in certain cases.—Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.”

COURT’S REASONING

THERE IS NO SEPARATE CATEGORISATION OF CHILDREN WHO ARE VICTIMS OF RAPE IN TERMS OF MARITAL STATUS.

11. Having heard learned counsel for the parties and having perused the aforesaid instructions received by learned counsel for Union of India, this Court is of the view that the POCSO Act is a special law which comprehensively deals with heinous crimes of sexual abuse and sexual exploitation of children. Before the enactment of this Act in 2012 some of sexual offences against children were prosecuted under the IPC.

12. Consequently, this Court is of the view that there is no distinct category within child victims of rape as those who are married and those who are not.

13. It is well established that when a general law and a special law dealing with some common aspect are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the Latin maxim of *generalia specialibus non derogant* i.e. general law yields to special law should they operate in the same field on the same subject. (See: ***Commercial Tax Officer, Rajasthan Vs. Binani Cements Limited and Another, (2014) 8 SCC 319***).

SECTION 19 READ WITH SECTION 21 OF THE POCSO ACT SHALL OVERRIDE THE RESTRICTIONS IMPOSED UNDER SECTION 198(1) READ WITH SECTION 198(3) OF Cr.P.C

14. The Supreme Court of India in another writ petition filed by the petitioner in ***Independent Thought vs. Union of India & Anr. (2017) 10 SCC 800*** has reconciled the POCSO Act with IPC and held that Exception 2 to Section 375 IPC shall now read as “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.*” The relevant portion of the said judgment is reproduced hereinbelow:-

“107.... Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.*” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

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197. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

“Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape”. It is, however, made clear that this judgment will have prospective effect.

198. It is also clarified that Section 198(6) of the Code will apply to cases of rape of “wives” below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.”

15. In any event, Section 42A of the POCSO Act specifically provides that in case of any inconsistency, the provisions of POCSO Act shall have an overriding effect on the provisions of any such other law to the extent of the inconsistency. Section 42A of the POCSO Act is reproduced hereinbelow:-

“42A. Act not in derogation of any other law. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

16. Consequently, this Court declares that Section 19 read with Section 21 of the POCSO Act shall override the restrictions imposed under Section 198(1) read with Section 198(3) of Cr.P.C. However, this Court clarifies that it has not dealt with the larger issue of ‘marital rape’ of an adult woman in the present proceedings.

SECTIONS 472 AND 473 Cr.P.C EMPOWER THE COURTS TO EXTEND THE PERIOD OF LIMITATION.

17. As far as the plea for extended period of limitation is concerned, this Court is of the view that Sections 472 and 473 Cr.P.C empower the Courts to extend the period of limitation, in the event it is satisfied that the facts and circumstances of the case necessitate extension of the period of limitation or that the delay has been explained properly. This Court is in agreement with learned counsel for the respondent that Section 3(3) of PCM Act deals with voidability of child marriage and does not extend the period of limitation to file complaints in cases of rape of a minor children who is married. Accordingly, in appropriate cases where minor victims are not able to file their complaints within time, the Trial Court has the power to extend the period of limitation, if it deems appropriate.

18. With the aforesaid declaration and observations, present writ petition stands disposed of.

MANMOHAN, J

SAURABH BANERJEE, J

MAY 3, 2023
KA/TS/AS